No. 88-1122

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

BERNHARD GOETZ,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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QUESTION PRESENTED FOR REVIEW

Did the trial judge create the potential for a directed verdict of guilty, thereby violating the Sixth Amendment and due process of law, by instructing the jury that it "must", as opposed to "may", convict petitioner if it found the elements of the crime in issue to have been alone proven beyond a reasonable doubt?

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Parties to the Proceedings Below

Petitioner, Bernhard Goetz, seeks a Writ of Certiorari to review an order of the Court of Appeals of the State of New York which affirmed an order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, insofar as it affirmed a conviction entered in the Supreme Court of

the State of New York, New York County (Hon. Stephen G. Crane).

There are no parties to this proceeding other than those above-referenced.

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Jurisdiction and Opinions Below

The as yet unpublished decision of the New York Court of Appeals in People v. Goetz, affirming the order of the Appellate Division was entered on November 22, 1988 (Appendix).

The decision of the Appellate Division, First Department, is reported at 141 A.D.2d 446, 529 N.Y.S.2d 782.

Jurisdiction is conferred upon this court pursuant to 28 U.S.C. §1257(3).

Constitutional Provisions Involved

Amendment Six

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment Fourteen, Section One

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

A. The Indictment

Under consolidated indictment number 476-1914/85 filed in New York County, petitioner Bernhard Goetz was charged with various offenses arising out of a shooting incident in a New York City IRT subway train on December 22, 1984. Among the charges returned by two separate grand juries[1] were one count of Criminal Possession of a Weapon in the Third Degree (New York Penal Law §265.02[4] [McKinney 1980]), two counts of Criminal Possession of a Weapon in the Fourth Degree (id., §265.01[1]), four counts of Attempt to Commit Murder in the Second Degree (one

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[1] The first grand jury only returned weapons charges while refusing to indict petitioner on any shooting-related offenses. Pursuant to authorization under New York Criminal Procedure Law §190.75(3) (McKinney 1982), a second grand jury returned the remainder of the consolidated indictment.

count as to each "victim") (id., §§110.00, 125.25[1] [McKinney 1987]), four counts of Assault in the First Degree (id., §120.10[1]), one count of Criminal Possession of a Weapon in the Second Degree (id., §265.03 [McKinney 1980]),[2] and one count of Reckless Endangerment in the First Degree (id., §120.25).

B. The Trial Court's Instructions

With respect to the various charges in the indictment -- and specifically that of Criminal Possession of a Weapon in the Third Degree -- the trial judge, amidst petitioner's protest that such amounted,

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[2] The additional element included in Criminal Possession of a Weapon in the Second Degree, as opposed to the weapons charges returned by the first grand jury, was the intent to use the weapon unlawfully (New York Penal Law §265.03 [McKinney 1980]).

inter alia, to a "directed verdict",[3] instructed the jury as follows at the end of the trial:

> ...with respect to Count One of the Indictment, if you find that the People have proved to your satisfaction beyond a reasonable doubt each of the five elements as I have just explained them, then you must find the defendant guilty of the crime of Criminal Possession of a Weapon in the Third Degree (emphasis added)[4]

C. The Verdict and Sentence

Pursuant to its deliberations, the jury acquitted petitioner of all charges except for Criminal Possession of a Weapon

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[3] Petitioner's objection was registered in a memorandum of law in support of his request for the less coercive "may" language. An additional exception was taken after the court's charge to the jury.

[4] The District Attorney argued in the State courts that the issue raised herein had not been appropriately preserved. However, both the Court of Appeals and the Appellate Division obviously disagreed and reached the merits of petitioner's claim.

in the Third Degree. The Court later imposed a split sentence of six months' imprisonment, followed by four and a half years' probation, which would include mandatory counseling from a therapist of defendant's own choosing, as well as a specified period of community service. A fine of $5000 was also imposed.

D. The Appeal

On appeal to the Appellate Division, in addition to raising issues addressed to the legality and propriety of the sentence, petitioner challenged the trial court's use of the mandatory "must" language with respect to the charge of Criminal Possession of a Weapon in the Third Degree as violative of the Sixth Amendment and due process of law. Petitioner argued that the use of such coercive terminology had the potential of directing a verdict by encroaching upon the jury's exclusive and constitutionally sanctioned discretion to

determine "ultimate" guilt -- above and beyond its responsibility of merely considering the elements of a charged offense.

Upon considering petitioner's arguments on the merits, the Appellate Division rejected the constitutional "directed verdict" contention while finding the sentence to have been illegally imposed. The matter was thus remanded for the sole purpose of resentence.

Following the granting of leave to appeal to the New York Court of Appeals that aspect of the Appellate Division's order which affirmed the underlying conviction, the State's highest court affirmed the order of the Appellate Division insofar as it had rejected petitioner's "directed verdict" contention (Appendix). Specifically addressing petitioner's federal constitutional

concerns, the Court of Appeals stated, inter alia, that,

> [c]ontrary to defendant's assertion, the jury instruction does not amount to a directed verdict because it does not encroach upon the jury's exclusive fact-finding prerogative by removing from its consideration some element of a crime or of [sic.] a defense to it (cf. United States v. Hayward, 420 F.2d 142 [D.C.Cir. 1969]; Brascomb v. State, 550 S.W.2d 450 [AR 1977]) (Appendix).

Reasons for Allowance of the Writ

The precise issue raised in this petition has never been squarely addressed by this Court and would, if considered, impact greatly upon the administration of criminal justice in each state of the Union. To be sure, although mandatory language similar to that employed by the trial judge herein has been involved in cases that have earlier survived the scrutiny of the Supreme Court, see, e.g., Sparf v. United States, 156 U.S. 51 (1895); Killian v. United States, 368 U.S. 231, 249, n.5 (1961), in each of those situations the issue before the court was not the constitutional infirmity in the instructions, but only whether the defendant had had a legitimate right to argue the concept of "jury nullification" to the jury -- something which petitioner has never urged he had a right to do.

The fact is that the two concepts are mutually exclusive. The best demonstration of this reality arises out of a consideration of two distinct opinions of the United States Court of Appeals for the District of Columbia Circuit. Thus, in United States v. Hayward, supra, when squarely confronted with the issue of such mandatory "must" language, the court held the following:

> The rule that a directed verdict of guilty is invalid is enforced no matter how conclusive the evidence in the case may be. While the judge in this case did not direct a verdict of guilty in form, that is the substantive effect of the instruction given. The rule against directed verdicts of guilt includes perforce situations in which the judge's instructions fall short of directing a guilty verdict but which nevertheless have the effect of so doing by eliminating other relevant considerations if the jury finds one fact to be true. As the Supreme said in Bollenbach v. United States, 326 U.S. 607, 614 (1946), "the

> question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts". See also, Schwachter v. United States, 237 F.2d 640, 644 (6th Cir. 1956); United States v. Gollin, 166 F.2d 123, 127 (3d Cir.), cert. denied, 333 U.S. 875 (1948); Carothers v. United States, 161 F.2d 718, 722 (5th Cir. 1947) (footnote omitted).

Nonetheless, only a year and a half later, in United States v. Dougherty, 473 F.2d 1113 (D.C.Cir. 1972), the same court soundly rejected a defendant's right to a jury nullification charge.[5] In so doing, the court, noting the "informal" sources of knowledge which a jury already has in learning of its mercy-dispensing powers, took occasion to observe that,

> [e]ven indicators that on their face seem too weak to

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[5] Significantly, Chief Judge Bazelon sat on both panels.

> notice -- like the fact that the judge tells the jury it must acquit (in case of reasonable doubt) but never tells the jury in so many words that it must convict -- are a meaningful part of the jury's input (emphasis added).

473 F.2d at 1135.

The end result is readily apparent. Although on the one hand, a defendant has no right either to argue or to have the judge charge on the concept of jury nullification, see Sparf, supra, Dougherty, supra, by the trial judge's using the mandatory "must" language, the potential for the exact opposite result obtains. Thus, under the instant facts, where Criminal Possession of a Weapon in the Third Degree under New York law is a strict liability offense, instead of avoiding having the jury nullify what otherwise would have been a conviction that was all but inevitable through the rejection of the requested term "may" and its consequent

use of the protested term "must", the court potentially accomplished the reverse.

Specifically, if an irresponsible jury is bent on nullifying "...in the teeth of both law and fact", Horning v. District of Columbia, 254 U.S. 135, 138 (1920), it will do so regardless of what language a trial judge employs. On the other hand, by employing the mandatory "must" language with respect to the five statutory elements alone, the court conceivably directed a guilty verdict on the part of this painstakingly selected and extraordinarily conscientious jury that may very well not have been otherwise returned under the peculiar facts of this case. Hence, where the jury, by such compulsive language, was even potentially precluded from considering all factors, beyond the mere statutory elements, toward its determination of petitioner's "ultimate guilt" (such as the fact of his several prior muggings and his

earlier unsuccessful attempt to secure a carrying permit), there was an equally potential violation of petitioner's constitutional rights to a fair and impartial jury under the Sixth Amendment and due process of law.

The constitutional concerns raised in this petition were perhaps best articulated by the dissent in the recent four-to-three decision of the New Jersey Supreme Court in State v. Ragland, 105 N.J. 189, 519 A.2d 1361 (1986). As therein explained:

> An instruction possessing this compulsive connotation stands at variance with the fine discretion that a jury must exercise when it is considering the myriad factors, definable and indefinable, obvious and subliminal, that bear upon the ultimate determination of criminal guilt or innocence. Against this risk of subtle but real prejudice, I do not see any actual benefit to be derived from the use of this language. Accordingly, I think it advisable that such language be discontinued because of its potential to

> be interpreted in a manner that compromises jury independence and blurs the accepted dichotomy between judge and jury.

105 N.J. at 220 (dissent per Handler, J.).

Assuming the correctness of petitioner's contentions, therefore, the administration of criminal justice in this country, on a state-by-state basis, and throughout the federal district courts, becomes increasingly suspect. From this standpoint alone, the instant petition raises "...an important question of federal law which has not been, but should be, settled by this court...". Rules of the Supreme Court, Rule 17.1(c). Moreover, to the extent that the New York Court of Appeals in this case, as well as the New Jersey Supreme Court in State v. Ragland, supra, can be read to be in conflict with the District of Columbia Circuit Court of Appeals in United States v. Hayward, supra, it is also apparent that "...a state court

of last resort has decided a federal question in a way in conflict with decisions of...a federal court of appeals". Rules of the Supreme Court, Rule 17.1(b). Indeed, several other state courts of last resort also appear to be in conflict both with Hayward and with each other. Compare, e.g., State v. Devoe, 301 A.2d 541 (Me. 1973) and Straughter v. State, 247 A.2d 202 (Del. 1968) to Brascomb v. State, supra, and People v. Gillespie, 54 Mich.App. 419, 221 N.W.2d 246, 247 (1974).[6] We ask this court to consider this issue, therefore, and establish a uniform standard in conformity with Sixth Amendment constraints.

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[6] But see, People v. Cargile, 83 Mich.App. 361, 268 N.W.2d 258 (1978).

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Dated: New York, New York
January 4, 1989

Respectfully submitted,

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APPENDIX

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

STATE OF NEW YORK
COURT OF APPEALS

1 No. 292

THE PEOPLE &c.,

Respondent,

v.

BERNHARD GOETZ,

Appellant.

MARK M. BAKER & BARRY SLOTNICK, NY City for *appellant* ROBERT M. MORGENTHAU, DA, NY County (GREGORY L. WAPLES of Counsel) for *respondent.*

MEMORANDUM

The order of the Appellate Division should be affirmed.

The trial court did not err in instructing the jury that, if it found that the People had proved each of the elements of the crime beyond a reasonable doubt, it "must" find defendant guilty. It is well settled that the jury's function is to apply the legal definition of the crime to the evidence and to convict if it is satisfied that each of the elements of the crime has been established beyond a reasonable doubt (*People v Mussenden,* 308 NY 558, 562; *see, Sparf v United States,* 156 US 51; *Duffy v People,* 26 NY 588, 592-593). While there is nothing to prevent a petit jury from acquit-

ting although finding that the prosecution has proven its case, this so called "mercy-dispensing power", as defendant concedes, is not a legally sanctioned function of the jury and should not be encouraged by the court (*People v Mussenden, supra, at* 562-562; *see, People v Boettcher,* 69 NY2d 174, 180; *People v Sullivan,* 68 NY2d 495, 500-501). Contrary to defendant's assertion, the jury instruction does not amount to a directed verdict because it does not encroach upon the jury's exclusive fact-finding prerogative by removing from its consideration some element of the crime or of a defense to it (*cf. United States v Hayward,* 420 F2d 142 [DC Cir 1969]; *Brascomb v State,* 550 SW2d 450 [Ar 1977]).

There is no merit in defendant's argument that the sentencing court abused its discretion, as a matter of law, or that it failed to exercise discretion in determining that a one year definite sentence would not be "unduly harsh" (*see,* Penal Law § 70.02[2][c]).

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Order affirmed in a memorandum. Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone, Hancock and Bellacosa concur.

Decided November 22, 1988